NSW LRC – Review of the Crimes (Sentencing Procedure) Act and sentencing at common law
Office of the Director of Public Prosecutions
Preliminary Submissions

The ODPP welcomes this review of the law in relation to sentencing in NSW. ODPP officers and Crown Prosecutors are well placed to observe that sentencing over the last 20 years has become an increasingly complex task. This submission has been prepared after consultation with a number of senior lawyers and Crown Prosecutors experienced in appearing in sentences in the District Court and in sentence appeals in the Court of Criminal Appeal.

The experience in NSW of increased complexity in sentencing law, "law and order" amendments in response to sensational cases, public confidence being distorted by media reports creating a perception of leniency when in fact sentencing trends show sentences are increasing is not unique. These features are shared by most comparable jurisdictions[1].

A survey of other jurisdictions shows these common themes:

- Law and order reaction to particular cases has led to piecemeal legislative amendment and increasing complexity of sentencing laws.
- Public confidence in administration of justice distorted by media reports, there is a perception of leniency when in reality sentencing practice shows an increase in the use of imprisonment.[2]
- Deterrence – specific and general – research is demonstrating that imprisonment and high maximum penalties does not achieve this[3].
- Creation of sentencing councils or advisory boards in a number of jurisdictions to take on a role somewhere between the executive and the judiciary to examine sentencing issues – high on the list of priorities of the Councils is to assist in making sentencing more transparent and promoting consistency.
- Creation of sentencing guidelines –In some jurisdictions regard is made matching sentence severity with prison capacity[4].

The attached list of the changes to sentencing law was drafted with the aim of trying to identify precisely how sentencing in NSW has become the protracted

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[1] "Penal Populism, Sentencing Councils and Sentencing Policy", Chapter 1 Arie Freiberg and Karen Gelb Hawkins Press 2008

[2] "Sentencing Snapshots" Media Release BOSCAR 25 September 2011

[3] See for instance Victorian Sentencing Advisory Council "Does Imprisonment deter? A review of the evidence" April 2011, "Marginal general deterrence doesn't work – and what it means for sentencing" Bargaric and Alexander (2011)35 [3]Crim LJ 269,

[4] Chapter 6, "The Minnesota Sentencing Guidelines" Richard S Frase p 91 on "Penal Populism" op cit.

complex process that it is in 2011[5]. In the time provided to make this submission this sort of analysis is not possible, we suggest however it is a task that NSWLRC could undertake to inform this reference.

One observation that can be made from the chronology is that it is not possible to identify a consistent and cohesive underlying policy behind the legislative changes. On the one hand there is benevolent innovative legislation that applies to some offenders (e.g. Forum Sentencing; the Drug Court, Pre Trial Diversion of Offenders) and on the other hand there are reforms that are only punitive in nature designed to gaol more offenders for longer periods (e.g. Standard Non Parole Periods (SNPP's), maximum life penalties, mandatory disqualification). It could be argued that the task of the sentencer would be easier if they were not receiving mixed messages from the policies underlying the laws.

Of particular concern to the ODPP is that sentencing proceedings have increased in duration. There is now generally an unacceptable delay of 4 to 6 months between plea or conviction and sentence in the District Court. This has had a significant impact across the criminal justice sector and to members of the community involved in the process. Judges rarely proceed to sentence on the first occasion, ex tempore judgments are being replaced by lengthy written judgments, extensively citing case law, evidence and written submissions from both parties. Court listing practices have not accommodated the increased duration in proceedings meaning adjournments are granted as the rule rather than the exception. The problems this creates include

- challenges for continuity of legal representation by the prosecution, if continuity cannot be maintained then a matter may be handled by two or three or more lawyers[6],
- the increases the cost of proceedings for the accused and the community.
- stress, anxiety, inconvenience and expense for victims, particularly those who wish to read victim impact statements in court, and more so where the Court venue changes over time with the Judge moving on circuit. The same considerations apply to the offender and his/her supporters.

Furthermore longer sentences and more errors made in the lower courts equate to more appeals in relation to CCA concerning sentence. While the DPP statistics [annexure B] show that the number of sentence appeals remains constant, it should be noted that the ODPP's work in the District Court has decreased over the same period. However these statistics do not take into account the number of matters considered by the Directors Chambers for the question of an appeal; up to 30 referrals a week may be

[5] This list is the product of cursory research and recollection and is not presented as an exhaustive list.

[6] Double handling exposes the process to other problems such as a different approach to the matter, changes to agreed facts, discontent by victims and so on.

made about SNPP matters. These developments have led to an increase of legal resources necessary to serve the courts.

It appears to the ODPP that delay and the increase in legal resources devoted to sentencing are products of sentencing laws that have become overly prescriptive and technical.

- **The ways in which sentencing law as a whole can be simplified and made more transparent and consistent**

The first point to be made is that sentencing is an inherently difficult task, it is neither wholly an art or a science to arrive at the instinctive synthesis required by the common law.

> *"One reason why the idea of instinctive synthesis is apparently abhorrent to lawyers who value predictability and transparency in sentencing is that they see the instinct of a sentencing judge as entirely subjective, personal, arbitrary and unconfined. In fact, although a sentencing judge does ultimately select a number, it is not from thin air that the judge selects it. The judicial air is thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance"*[7].

The threshold of the complexity in the sentencing process is the interaction of Legislation and the extensive common law on sentencing.

Kirby J observed in *Markarian*

> *"I have more concern about the omission of the sentencing judge and of the Court of Criminal Appeal to pay regard to the requirements of s21A of the Sentencing Act. As is now common ground, that section applied to this case. It is a rudimentary error in the exercise of a sentencing discretion (or of the discretion enlivened by the appellate re-sentencing of an offender) for the decision-maker to fail to take into account a relevant consideration. It is clearly relevant for a judge engaged in sentencing, or re-sentencing, to pay regard to an applicable provision of the written law, such as the Sentencing Act, made by Parliament to apply to such a case. Statute law, having the higher authority of Parliament, cannot be waived by parties simply because they are ignorant of it or because they choose not to argue it although it is applicable. Once such an omission comes to light in proceedings that are still current within the Judicature, judges, certainly when they are on notice of such provisions, are under a constitutional duty to obey them and give them effect."*[8]

We believe that "truth in sentencing" should be maintained so victims and the community can know the actual minimum sentence an offender sentenced to a custodial sentence will serve.

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[7] McHugh J Markarian v R [2005]HCA 25 at 76
[8] Ibid par 102

Repeal section 21A

The two suggested reforms unanimously nominated by ODPP officers in response to a request for comments in relation to this submission are to repealing section 21A and the Standard Non Parole Scheme. Comments made about section 21A include:

- it adds nothing to the common law
- it invites a circular process of reasoning
- it actively sets traps for the unaware
- compliance with the mechanics of the section is unduly time-consuming, complex and has a real risk of error.
- the provision is unnecessary. It distorts the sentencing process, is productive of confusion.

The Court of Criminal Appeal Unit at the ODPP deals with large numbers of appeals based on a failure to apply or misapplication of the section by sentencing judges.

Whilst many factors were already present in the common law, section 21A has cemented a "check-list" approach, which means that when judges fail to expressly mention a matter or blur the distinction in dealing with section 21A between the "objective" features of the offence and the 'matters personal to the offender', an appeal point is raised, and CCA judges will readily latch onto that aspect, sometimes despite no lesser sentence being warranted in law under section 6(3) of the *Criminal Procedure Act*.

There are also some "gray areas" in section 21A, one example being section 21A(n): planning, a common appeal point especially in drug supply matters and robbery matters; how much planning warrants a section 21A consideration ?

The principle in *R v Di Simoni*[9] also regularly arises as an appeal point, as the presence of section 21A means that judges are drawn to aggravating factors, adding to their task by having them determine what factors are relevant and what factors to ignore. The absence of section 21A would enable Judges to remain focused on the elements of the offence and its objective gravity and the subjective features of the offender.

Repeal Division 1A

There has never been any assistance provided by the legislature as to how SNPP's were determined. Accordingly it makes it difficult for prosecutors advocating application of the scheme as it is not possible to rationalise the relationship between SNPP's , maximum penalties for particular offences and between particular offences.

[9] R v Di Simoni [1980-81] 147 CLR 383

The selection of SNPP offences must seem arbitrary from the offenders perspective, particularly where alternate offences may be applicable. There is certainly anecdotal evidence of the impact the presence of a SNPP offence has on charge negotiation, and pre *R v Muldrock*[10] the incidence of pleas being entered to offences with SNPP's to avoid the impact of *R v Way*[11].

Certainly pre *Muldrock*, where an offender was facing multiple offences and some are SNPP offences, the sentencer has the additional burden of approaching the sentences for the offences in different ways. There are a number of CCA decisions which deal with sentencing judges who are evidently confused by the SNPP provisions. In particular, there has been criticism of judges who make findings about where in the range of objective seriousness an offence falls when there is no standard non-parole period[12]. This undoubtedly creates confusion, as that is the critical issue when dealing with an offence for which there is a standard non-parole period. Sentencing judges must be conscious of shifting their approach depending on whether or not there is a standard non-parole period, which quite often means arguable error, hence an appeal.

Pre *Muldrock*, CCA decisions have also been critical about how judges indicate where in the range of criminality an offence falls, finding that offences are "at least" in the mid-range being the main cause for complaint. Judges are unduly burdened by the degree of detail in the legislation.

There is a lack of consistency between offences re the lengths of the SNPP relative to the maximum penalties. This (and the existence of SNPP offences in the first place) causes an inevitable shift away from the maximum penalty as the ultimate benchmark.

- **The priority issues in sentencing law that require investigation and reform**

Introduce comprehensive Sentencing Guidelines/ Guideline judgments

Repeal of section 21A and Division 1A of the Sentencing Act would effectively reduce the scope of technical error for Judges. A question remains that if this was to occur is there a need, or at least there is room, to supplement the sentencing process with comprehensive sentencing guidelines, along the lines of the UK Sentencing Council Guidelines, to aid the sentencer and with the objective of promoting transparency and consistency in sentencing.

The UK Guidelines provide a single source of information for primarily the Judge, but it is available for the other parties and the community, that explains

[10] [2011] HCA 39
[11] R v Way [2004] NSWCCA 131
[12] Sivell [2009] NSWCCA 286 at [32]; Georgopolous [2010] NSWCCA 246 at [31]-[32]; Okeke [2010] NSWCCA 266 at [32].

the sentencing process and gives a clear direction in the sort of penalty that might be expected for the offence. In support of this concept the following points may argued:

- Public and expert views are taken into account in developing guidelines not just judicial views. Expert input is multi disciplinary and includes penologists. The judicial aspect comes in to the application of the guidelines, and discretion in applying all the facts and features of the case.
- Guidelines consolidate and summarise precedent , so Judges and lawyers don't have to go to numerous cases, this ameliorates the problems of conflicting precedent
- Guideline Judgments are lengthy – Guidelines are shorter and to the point.
- Guideline judgments focus on sentence worst case scenario and ultimately distort the sentencing pattern downwards, for example a review of cases since *R v Whyte*[13] shows that there are no cases where the sentence imposed was more than 4 years, questioning the role for the maximum penalty to play.

The amount of detail and work involved in the production of the UK Guidelines is daunting but it could be argued the resources utilised in NSW to date on sentencing might have been more constructively directed in the development of a resource like the Guidelines.

General Deterrence

There is research[14] that demonstrates that as a principal of sentencing general deterrence does not work. Higher sentences do not deter offenders. The research brings into question the appropriateness of general deterrence being taken into account in the sentencing process.

Section 3A of the Sentencing Act should be reviewed as to the purposes of sentencing. It is noted that general deterrence was cited in the second reading speech as one of the rationales behind SNPP's.

Investigate ways sentencing procedure can be simplified, streamlined and shortened

As the stakes are now higher for the offender in the superior courts, there is a flow on effect on the sentencing process. Understandably the defence endeavour to construct the best case possible. The increasing use of technology, including word processing has led to briefs being bigger and reports longer. The following quote from case of *R v Majors* 7.6.11 CCA by Carruthers J illustrates how the process has changed since 1991

> *"except in rare cases, those representing the offender should be in a position to adduce all relevant evidence in mitigation at the*

[13] R v Whyte [2002] NSWCCA 343

[14] Victorian Sentencing Council and an article "Marginal general deterrence doesn't work – and what it means for sentencing" Bargaric and Alexander (2011)35 [14]Crim LJ 269,

conclusion of the trial. Adjournment of the sentencing process to enable the preparation of a pre sentence report should be confined to those case where it is apparent to the judge that there is a clear and legitimate advantage to be obtained by this course".

Use of expert reports

What we suggest is that the ways sentencing proceedings can be simplified, streamlined and shortened should be investigated. One aspect that could be looked at is the use of and reliance on expert reports. Analysis could be undertaken about what value psychological reports and Pre sentence reports actually add to the process and how they assist the decision maker, with a view to limiting this evidence only in certain types of cases.

Sentence Indications

Another possible way of reducing some of the delay and duration in sentencing would be to revisit sentence indications. Assuming for a moment, that there were sentencing guidelines along the lines discussed above, those had been explained to the offender, he/she accordingly would have a clear expectation about what the sentence is going to be, the Judge is presented a summary of the sentencing evidence, can makes an indication and ask if either party wish to be heard further. In such a process the need for expert reports may be greatly diminished.

Reduction of error

We suggest that there is a need to reduce the amount of appealable error made by sentencers. We suggest the use of specialist Judges (given most appeals emanate from a handful of Judges) and changing threshold for appeal i.e. manifest inadequacy or excessiveness must be first established, then error may be looked at. We also suggest that there be expansion or clarification of the circumstances where the slip rule s43 C(SP) A applies – making it clear that you can apply to the court any time before the sentence expires may reduce number of appeals.

- **Any sentencing options in addition to those that currently exist that could be provided as an alternative to imprisonment, either generally or in relation to particular categories of offenders and**

Diversion

A comprehensive and consistent option of diversion for a broader range of offenders and offences should be investigated. The policy underlying the diversionary schemes should be consistent with a general policy in respect of sentencing. Diversion should be a readily available option generally for first offenders, the mentally ill and drug dependent persons.

Consideration should also be given to providing diversionary options for offenders under 25 on basis of research about cognitive development and maturity.

Periodic Detention and ICO's

Consideration should be given to reintroducing Periodic Detention as it was an important option in the sentencing regime as an alternative to full time custody that is now missed. The option allows the court to send someone to gaol without disrupting employment, family life and community ties. The benefit to the community of the offender being able to continue to be employed should not be underestimated in any analysis of the costs associated with Periodic Detention.

It appears that since Periodic Detention was removed as a sentencing option more offenders are getting goal terms because they are not suitable for ICO's. Further ICO's presently have greater geographical limitations than periodic detention did. Both options should be available as sentencing options state wide.

- **The operation of the standard minimum parole period**

See comments above, our position is that Division 1A should be repealed.

Office of the Director of Public Prosecutions
31 October 2011

Changes to sentencing law NSW 1991 - 2011

Year	Development	Change
1991	R v Majors 7.6.11 CCA Carruthers J	"..except in rare cases, those representing the offender should be in a position to adduce all relevant evidence in mitigation at the conclusion of the trial. Adjournment of the sentencing process to enable the preparation of a pre sentence report should be confined to those case where it is apparent to the judge that there is a clear and legitimate advantage to be obtained by this course"
1992	R v Fernando (1992) 76 A Crim R 58	Sentencing aboriginal offenders
	Criminal Procedure (Sentence Indication) Amendment Act (1992)	Sentence Indication Hearings pilot programme to be conducted by the District Court between 1 February, 1993 and 31 January, 1995
	Periodic Detention of Prisoners (Amendment) Act 1992	To address absenteeism levels evident in the programme, through the introduction of immediate sanctions for periodic detainees who fail to report as required. R v Nolan (unreported, Supreme Court, 17.7.92).
1993	R v Allpass reported 1994 72 A Crim R 561	Sentencing for child sexual assault, community outrage at leniency leading to extra curial punishment of accused. Crown criticised for submitting a bond was appropriate.

	Sentencing (Life Sentences) Amendment Act	Enables court to direct that the prisoner should not be given any further opportunity to be considered for parole and must therefore serve the sentence for the term of the person's natural life (section 13A(8) & (8A)).
1994	Crimes Amendment	Sentence Indication Hearings Pilot Scheme extended until 31 January 1996.
1996	Crimes Amendment (Mandatory Life Sentences)	
	Criminal Procedure Amendment (Victim Impact Statements) Regulation	Specifies the requirements for victim impact statements in criminal proceedings
	Criminal Procedure Amendment (Sentences Adjustment) Act	Legislative response to the comments of the Chief Justice in R v McMahon (unrep) CCA 26.6.96. adjustment of any cumulative sentence of imprisonment when an earlier sentence is quashed or varied on appeal or otherwise. The cumulative sentence would have been set to commence at the end of the earlier sentence.
1997	Young Offenders Act	Introduction of Youth Justice Conferencing
	Amendment Community Service Orders Act, Periodic Detention Act and Home Detention Act	The Act amends, in a significant way, the effect of breaches of community service orders.
1998	Jurisic (1998) 45 NSWLR 209	Dangerous driving causing GBH– media coverage of initial sentence of periodic detention.
	R v Pearce (1998) 194 CLR 610	Sentencing multiple offences approach to be taken individual sentences for each charge.
1999	Crimes Sentencing Procedure	Amalgamating and re-

	Act 1999 replaces Sentencing Act 1989 (truth in sentencing legislation fixed minimum and additional terms)	enacting sentencing provisions in several Acts. Codified Griffith remands, removed recognizances replaced with bonds NPP's reintroduced "Special circumstances" – vary the statutory ratio S5(2) reasons for imposing sentence of 6 months or less
	R v Henry (1999) 46 NSWLR 346	Guideline Judgment armed robbery
	"Ponfield" Re Attorney General's Application (No 1)(1999) 48 NSWLR 327	Break enter steal guideline
	Drug Court commenced February 1999	
2000	R v Thomson Houlton [2000] NSWCCA 309	Guilty pleas 10- 25% discount
2001	Crimes Local Court (Appeal and Review) Act , repeal of Justices Act	
	Amendments C(SP) Act re guideline judgements	S37A Guideline Judgements amendments in response to R v Wong [2001] HCA 64
2002	Amendments C(SP) Act	Sections 3A and 21A inserted
	Attorney general's application No 1 of 2002	Use of Form 1's
	Circle sentencing trial introduced	
	R v Whyte [2002] NSWCCA 343	Guideline judgment dangerous driving
	R v AEM, KEM, MM [2002] NSWCCA58	Sentencing aggravated sexual assault, "agreed facts" criticised
2003	Amendment C(SP) Act (Standard Minimum Sentencing Act)	Introduction of Division 1A Standard Non Parole Periods
	Amendments C(SP) Act	Section 3A principles of sentencing Section 21A Only whole of a sentence (and not part) may be suspended Periodic detention not available for certain sexual offences Breach of bond can only be dealt with by superior court

		with offenders consent Sentencing jurisdiction local increased Victim impact statements may be read out in court
	R v Elfar [2003] NSWCCA 358	Self serving statements in psychological etc reports – CCA critical of untested self serving statements which attempt to minimise criminality – Crown obliged to object.
2004	R v Way [2004] NSWCCA 131	A plea of guilty a mitigating factor that justifies departure from SNPP scheme
	R v Fidow [2004] NSWCCA 172	Special circumstances – cautioning overuse and need to provide reasons
	Compulsory Drug Treatment Correctional Centre Act 2004	
2005	R v Markarian (2005) 215 ALR 213	Instinctive synthesis or two tiered approach debated – two stage approach apt to give rise to error and an approach that departs from principle
	Crimes (Sentencing Procedure) Act 1999 and the Crimes (Administration of Sentences) Act 1999	To ensure that the current regime for redetermination of existing life sentences as it applies to "never to be released" offenders:
	Criminal Procedure Amendment (Community Conference Intervention Program) Regulation	The program will enable young adult offenders who have pleaded guilty to, or been found guilty of, particular offences before certain Local Courts to be referred to participate in conferences for the purposes of developing intervention plans for the offenders
	Crimes (Sentencing Procedure) Amendment Act 2006	This Act amends the with respect to sentencing for crimes committed against public transport workers or

		community workers such as surf life savers.
	Crimes and Courts Legislation Amendment Act 2006	Miscellaneous amendments including revocation of suspended sentences
2007	Amendments to Crimes Act	Principals in second degree liable to same punishment as the principal offender
	R v Nikolic [2007] NSWCCA 232	SNPP's not to be used as a starting point
2008	Amendments C(SP) Act	S21A (2) additional aggravating circumstances and changes to "remorse" as a mitigating factor 11 new offences added to the SNPP scheme
2009	Criminal Case Conferencing Trial	Scheme included reduction in sentence for early pleas
2010	C(SP) Amendment	Introduction of ICO's repeal of periodic detention
2011	Crimes Act Amendment	Mandatory life sentence for murder of police officers
	Amendments C(SP) 2010 –	Introduction of s35A and other amendments following sentencing councils recommendations
	R v Muldrock [2011] HCA 39	SNPP's R v Way wrongly decided

Appeals by offenders	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
Conviction and sentence appeals	119	154	105	119	107	99	74	81	55	87
Sentence appeals	246	185	217	259	211	199	154	193	173	166
Summary dismissals	114	71	11	0	3	2	1	0	1	0
Appeals abandoned *	212	149	7	6	6	8	7	6	3	7
Total Appeals by offenders	**691**	**559**	**340**	**384**	**327**	**308**	**236**	**280**	**232**	**260**

Other Appeals	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
Crown Inadequacy Appeals *	79	84	98	87	80	73	72	78	48	57
Appeals against interlocutory judgments or orders (s.5F appeals)	14	35	25	20	25	20	16	15	15	17
Stated cases from the District Court	2	1	4	1	3	3	1	2	0	1
Total Other Appeals	**95**	**120**	**127**	**108**	**108**	**96**	**89**	**95**	**63**	**75**

TOTAL APPEALS FINALISED IN CCA	786	679	467	492	435	404	325	375	295	335

	Matters committed for sentence to the District Court*									
DC Sentences	**01/02**	**02/03**	**03/04**	**04/05**	**05/06**	**06/07**	**07/08**	**08/09**	**09/10**	**10/11**
Received	1550	1390	1421	1354	1318	1391	1500	1707	1669	1716
Completed	1425	1407	1664	1465	1456	1357	1526	1597	1810	1633

** Data extracted from CASES as of 08/10/11*